No. 216.

Brief of Greene for D. E.

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No. 216.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
PLAINTIFF IN ERROR,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error

BRIEF FOR DEFENDANT IN ERROR.

I

The federal question.

The bill alleges and the answer admits that, on or about Aug. 28, 1890, the plaintiff in error furnished the Oconto Water Company, a corporation of Wisconsin, iron pipe necessary to be used, and which was used, in the construction of its water works plant; that on Jan. 28, 1891, plaintiff in error filed its claim for a lien, under the statute of Wisconsin, on such plant for such claim, and on Jan. 30, 1891, began suit in the United States Circuit Court for the Eastern District of Wisconsin, against said Oconto Water Company only, to foreclose such lien; that on Oct. 3, 1892, decree was entered in such suit for such lien for the sum of $24,250.04, and that such plant *and the franchise to operate it* be sold pursuant to the state statute to satisfy the lien; and that, on Aug. 23, 1897, pursuant to said decree, the marshal did sell the plant and franchise to plaintiff in error for $500, and that on Aug. 28, 1897, the sale was confirmed and a marshal's deed thereon executed

to it. The bill claims that by such deed, the plaintiff in error became the owner of the plant and franchise by title *prior* to any lien or title of defendant in error (Trans. pp 14 and 15, 20).

The bill further alleges and the answer admits that, on Sept. 18, 1890, the Oconto Water Company executed a mortgage of its right and franchise to construct, maintain and operate said water plant, to S. D. Andrews and W. H. Whitcomb, and, on March 13, 1891, executed a second mortgage to them of such right and franchise; that on June 17, 1891, said mortgagees began suit against said mortgagor in the proper state court to foreclose said mortgages, and that, on Aug. 13, 1891, judgment of foreclosure and sale in said suit was rendered; that on such foreclosure sale the mortgaged property was bid in by said Andrews and Whitcomb; that thereupon said purchasers took possession of the plant and continued in possession until July 25, 1892, when they transferred the purchased property to defendant in error; and that thereupon the defendant in error took possession of the plant and has ever since been in possession of it. It is undisputed that such foreclosure sale was duly confirmed by the state court (Trans. pp 16, 168).

The bill alleges that defendant is a corporation of Wisconsin organized by Andrews and Whitcomb, as such foreclosure purchasers, to take and operate such plant, pursuant to section 1788 R. S. of Wisconsin; and that Andrews and Whitcomb took their mortgages and purchased on foreclosure, and that defendant in error purchased from them, knowing that plaintiff's pipe had gone into the construction of the plant and was not paid for (Trans. pp 13, 17).

The prayer of the bill, as amended, is for judgment (1) against defendant in error for the value of said pipe and the amount of its lien, (2) that possession and use of the plant be given to plaintiff in error, (3) that defendant in error be enjoined from possessing or using it or the pipe absolutely, or unless defendant in error pay to plaintiff in error the amount of its lien, within a time to be fixed by the court. (Trans. pp 17, 25,26).

The answer, as amended, among other things, avers, and this is undisputed, that on Oct. 5, 1896, a judgment was rendered in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit wherein the plaintiff in error was complainant and S. D. Andrews, W. H. Whitcomb, *the defendant in error*, the city of Oconto and others were defendants, whereby it was adjudged that the lien decree against the Oconto Water Company only, alleged in the bill, was of no effect against Andrews and Whitcomb or the defendant in error and that, as to them and all the world except the Oconto Water Company, the plaintiff in error never had any lien. (Trans. pp 27 to 29). The judgment thus set up was found by the trial court and the finding was affirmed (Trans. pp 169, 173, 144). The suit, in which it was rendered, was a creditor's bill founded on the return unsatisfied of an execution on a judgment at law for the same debt for which the lien decree was rendered. It was begun Jan. 18, 1892, and sought to sequester the water plant and franchise and to apply them to liens according to their priority and to unsecured creditors. The bill alleged that the foreclosed mortgages were fraudulent and void. After the lien decree of Oct. 3, 1892, the bill was amended to allege it. (Trans. p 130) The answer to the amended bill in the creditor's suit claimed that such decree had no effect as to Andrews and Whitcomb and defendant in error, because they were not parties to the lien suit. (Trans. pp 131, 133). Thereupon the bill was again amended to set up all the facts on which a lien was claimed, precisely as in the lien action. (Trans. pp 134, 135). There was a general replication. The creditor's suit was tried on these issues. Before the hearing but after the lien decree, the State Supreme Court decided that there was and could be no mechanic's lien on the water plant and franchise. *Chapman Valve etc. Co. vs. Oconto Water Co.* 89 Wis. 264. This decision the United States Circuit Court of Appeals followed in the creditor's suit, and it held that plaintiff in error had no lien on the plant or franchise as against the defendant in error or Andrews and Whitcomb, by the lien decree or otherwise; that by the statute of Wiscon-

sin, there could be no lien on such property; that Andrews and Whitcomb and defendant in error were neither parties nor privies to the lien decree and hence not affected by it; that the foreclosed mortgages embraced the plant as well as the franchise; and that their foreclosure in the state court was valid and gave defendant in error good and paramount title. *Andrews vs. Nat. Foundry etc. Co.* 46 U. S. App. 281, 619. The decree in that case was final (Trans. p 144).

In the court below, plaintiff in error contended for the relief prayed in its bill, viz, in substance, (1) payment of its claim for pipe by defendant in error or (2) possession of the plant absolutely or until payment, on these grounds: 1. That defendant in error having been organized, as a corporation under the state law, to take and operate the property sold on the mortgage foreclosure, was the successor of the Oconto Water Company in such sort as to be liable for its debts and was, hence, liable for the debt for this pipe. 2. That defendant in error was liable for such debt, because both Andrews and Whitcomb and itself bought the property knowing that the pipe went into the construction of the plant and was not paid for. 3. That the decision of the federal court in the creditor's suit that the lien decree gave no lien and there was none, as to the defendant in error and Andrews and Whitcomb, did not involve the right of plaintiff in error to hold defendant in error liable for its claim upon the the ground that the latter took the property subject to the lien claim. 4. That the foreclosure of the mortgage in the state court was without jurisdiction, because at the time it was begun and of the sale and confirmation, the suit to foreclose the mechanic's lien was pending in the federal court. 5. That the judgment appealed from should not have given affirmative relief.

1. Manifestly the first contention involves no federal question. The only question it presents, if it can be seriously called a question, is whether a corporation, organized under the particular state statute, to buy the property of another corporation sold on the foreclosure of

a mortgage made by it, is thereby liable for the unsecured debts or junior incumbrances of the mortgagor.

2. So, the second contention raises a question of general law only, viz, does one who buys on the foreclosure of a mortgage become liable for the debts of the mortgagor, which were for the betterment of the mortgaged property to the knowledge of the purchaser when he bought. The claims of the plaintiff in error, in the first two contentions, were wholly irrespective of the lien decree of the federal court.

3. The third claim presents the question, whether the determination in the creditor's suit is *res adjudicata* herein that plaintiff in error has no lien as against the defendant in error, either by the lien decree or otherwise. Although the decrees in the lien and creditor's suits were by federal courts, the mere question whether, and to what extent, the latter was a bar was not therefore federal.

Choteau vs. Maffit, 111 U. S. 200.
San Francisco vs. Itsell, 133 U. S. 65.

Besides, the plaintiff in error conceded below that the decision in the creditor's suit was conclusive that the lien decree gave no lien and that plaintiff in error had none, as to defendant in error and Andrews and Whitcomb. It said in its brief that the decree in the creditor's suit determined that "Andrews and Whitcomb and the Oconto City Water Supply Company, not having been parties to the mechanic's lien suit, were not bound by such lien decree," and that plaintiff in error "had no lien upon the property as against Andrews and Whitcomb's mortgages, and therefore could not question the validity of the title obtained through their foreclosure." And the court below said: "It is conceded that, under that rule [res adjudicata], it was not open for appellant in this case to litigate the question of whether its lien judgment was binding on the respondent" [defendant in error]. Again the court said: "Appellant's counsel concedes that the effect of the decree [in creditor's suit] is that their claim was not a lien upon the water company's property as against Andrews and Whitcomb's mortgages. With that concession,

there was nothing left undecided, as it seems, which is involved in this case." (Trans. pp 182, 183). If there was thus no question whether the decree in the creditor's suit was conclusive that there was no lien as against defendant in error, what question as to the effect of the federal decrees was there?

4. The question whether the mortgage foreclosure in the state court was void, because foreclosure of the mechanic's lien was then pending in the federal court, may be, in form, federal. But, as the court below said, it is immaterial. The mortgages were valid. Defendant in error was in possession, through an attempted foreclosure. If, for any reason, the foreclosure was void, it still had the right of possession.

Bryan vs. Brasius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Cunningham vs. R'y. Co., 156 U. S. 400.
McCormick vs. Herndon, 78 Wis. 661, 664.

The court below pertinently said: "It being conceded or undisputed that respondent [defendant in error] is legally in possession of the mortgaged property, with at least the rights of mortgagees so circumstanced, it cannot be ousted from that possession without payment of the mortgage indebtedness, nor can it be made to pay junior liens as a condition of enforcing its primary right" (Trans. p 183).

5. The question whether the judgment should give affirmative relief is not federal.

There must be a *real* federal question to give this court jurisdiction.

Hamlin vs. Land Co., 147 U. S. 531.
New Orleans vs. Waterworks Co., 142 U. S. 79.
Millinger vs. Hartupee 6 Wall, 258.

"Otherwise a federal question might be set up in almost any case." 142 U. S. 79. The only federal authority that appears in the case is the action of the federal courts in the lien suit and the creditor's suit. When plaintiff in error concedes that under this authority, it has no me-

chanic's lien as against the defendant in error, the only *real* question is, must the latter pay the unsecured debt for this pipe or surrender possession, either because (1) it is the corporate successor of the Oconto Water Co. or (2) bought the plant knowing of such debt.

But we proceed briefly to consider the claims of plaintiff in error, assuming that they involve a substantial federal question.

II

Plaintiff in error cannot recover on the ground that it has any lien or title.

I It is *stare decisis* in the state court and *res adjudicata* between these parties that plaintiff in error never, in fact, had any lien, and had none by judgment estoppel, against defendant in error.

Chapman Valve Co. vs. Oconto Water Co. 89 Wis. 264.

Andrews vs. Nat. Found. etc. Co. 46 U. S. App. 281, 619.

Buncombe vs. R'y. Co. 115 U. S. 128.

C. and N. W. R'y. vs. Forest County 95 Wis. 89.

The doctrine is thus stated: "The franchises and rights of a quasi public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold, on execution, or for mechanic's liens, or on tax process." 95 Wis 89.

In *Andrews vs. Nat. Found. etc. Co.* 46 U. S. App. 281, 619, wherein the question arose *between the parties hereto* for the first time, plaintiff in error set up in its bill the lien decree and also the special facts on which it claimed a lien. (Trans. pp 130, 134, 135). The answer denied the right to lien. The bill prayed that the mortgages "be adjudged null and void" and that plaintiff in error and an

intervenor "*be decreed to have mechanic's liens* against the property and franchises of the Oconto Water Company, and that such lien be adjudged prior in time to any lien or encumbrance on said property asserted or claimed by or on behalf of * * * Andrews and Whitcomb" (Trans. p 135). The answer also set up the mortgages and their foreclosure, and the sale of the mortgaged premises to Andrews and Whitcomb and defendant in error. The plaintiff in error took issue on this by general replication. (Trans. pp 95 to 97, 129). The court decided that there was no lien as to Andrews and Whitcomb and defendant in error, and that the mortgage foreclosure gave paramount title. On rehearing in was claimed that the lien decree bound Andrews and Whitcomb and defendant in error by *lis pendens*. But the court said: "They purchased upon the foreclosure of their own mortgage, which antedated the commencement of the suit of the lien holders, and *the title which they obtained related back to the date of their mortgage*. The doctrine of *lis pendens*, as we conceive, does not apply." 46 U. S. App. 281, 619. This is the settled law.

Corsair vs. Kincaid, 40 Minn. 467.
Horn vs. Jones, 28 Cal. 195.
Jaycox vs. Smith, 45 N. Y. Sup. 299.
Bank vs. Taylor, 131 Ill. 376.
Dull vs. Blackman, 169 U. S. 243, 248.
13 *Am. and Eng. Enc. of Law*, 899.

Plaintiff in error also claimed, on rehearing, that the mortgages did not include the plant and that the foreclosure sale, although confirmed, was void because made within the period of redemption. The court overruled both contentions. 46 U. S. App. 619.

The questions as to whether plaintiff in error had any lien by decree or otherwise, whether the mortgages were foreclosed, and whether the foreclosed title was paramount, were distinctly raised by the pleadings and decided. Both the record and the opinions show this. The rule in such cases is thus stated in *R'y. Co. vs. U. S.*, 168 U. S. 1, 48:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

New Orleans vs. Bank, 167 U. S. 371, 396.

The plaintiff in error having no lien as to defendant in error, it follows that the marshal's deed gave no title or interest. The whole interest had then vested in defendant in error under the paramount mortgage.

II. If plaintiff in error has any lien paramount to the mortgage or title under it, its remedy at law is adequate.

With such lien, the marshal's deed gives paramount title, on which plaintiff in error could maintain ejectment. Where, as here, the plaintiff in error seeks legal relief—possession of the property and a money judgment—and shows no distinctive ground of equitable relief, the objection is not waived by failure to answer or demur.

Burnham vs. Norton, 100 Wis. 13.
Stein vs. Benedict, 83 Wis. 603, 616.
Trustees vs. Kilbourne, 74 Wis. 452.
Avery vs. Ryan, 74 Wis. 599.
Sullivan vs. R'y. Co., 94 U. S. 806, 811.

III. There is but one alternative to this conclusion. It may be claimed that there is a paramount lien by the lien decree against the Oconto Water Co. only, and that the object of this suit is to enforce or get some benefit of such lien against one not a party to the decree. The suit, in that aspect of it, concedes that the lien decree cannot be enforced against defendant in error, because not a party, by the regular process of the court in the lien suit. Therefore, plaintiff in error returns to a court of equity in a new suit and asks it by a new decree to compel defend-

ant in error to surrender the plant or pay the debt, because of the erroneous decree and in satisfaction of the lien which it adjudges. Without that decree, plaintiff in error confessedly has no lien. With it, it claims that it has some equity to a lien against a stranger, which, although unenforceable by regular process upon the decree, equity should enforce, by compelling such stranger to pay the lien. It is, in effect, an attempt to make defendant in error a party to, and bind it by, the lien decree. Equity will not do that. "When the common process of the court will not serve, but a new bill and new decree is become necessary" to enforce a former decree, equity will not give relief if the former decree is erroneous.

Lawrence Mfg. Co. vs. Cotton Co., 138 U. S. 552.
Woodhouse vs. Gay, 73 Ill. 415, 430.
Gay vs. Parport, 106 U. S. 679.
Comptom vs. Jessup, 68 Fed. Rep. 263, 314, 315.
2 *Beach Equity Juris.*, Sec. 904 and cases.
3 *Enc. of Pl. and Pr.*, 604 and notes.

In *O'Connel vs. McNamara*, 3 D. & W. 411, Sugden L. C. said: "I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to show that such decree was right." In *Lawrence vs. Berney*, 2 Ch. Rep. 127, the court said: "When the common process of the court will not serve, but a new bill and new decree is become necessary to have the execution of the former decree, which is in itself unjust, then this court desired to be excused, in making it its own act, to build on such ill foundation." This court declares the doctrine thus: "When a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree, as respects the relief granted by the new bill." 138 U. S. 552. The extraordinary aid of equity will not be given to enforce or perpetuate an error. The principle has special force where, as here, the error of the decree has been determined by the state and federal courts, in suits between

the parties, and consists *in declaring a lien contrary to the public policy of the state.* To give the relief here prayed for, in effect enforces a mechanic's lien on this plant; against that policy. The plant and franchise are instrumentalities of the state in the hands of its agent, for public use.

Olcott vs. Supervisors, 16 Wall 594.
Chapman Valve Co. vs. Water Co., 89 Wis. 272.
Cohen vs. Boom Co., 47 Wis. 324.
East Ala. R'y. vs. Doe, 114 U. S. 350.
Buncombe vs. R'y. Co., 115 U. S. 128.

To grant the relief asked is to transfer the possession of the plant and franchise from such agent to the plaintiff in error, a foreign company, unless defendant in error pays the debt; in substance what the enforcement of a lien would do and what, by the public policy, cannot be done.

III

Plaintiff in error cannot recover unless it had a paramount lien.

I. Defendant in error is not liable as the successor of the Oconto Water Company.

Section 1788 R. S. provides:

"Any person or association of persons, which shall have, or may hereafter, become the owner or assignee of the rights, powers, privileges and *franchises* of any corporation * * by purchase under a mortgage sale * * may, at any time within two years of the said purchase * * * organize anew by filing articles of organization as provided *in this chapter*, or elsewhere in these statutes respecting corporations for similar purposes, and shall thereupon have the same rights, privileges and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale and such as are provided by these statutes applicable thereto. They may fix at what price or for what number of shares the rights, privileges, powers, franchises and property of such former corporation, purchased by them, shall be put into the new organization."

Defendant in error organized under chapter 86, pursuant to this provision. The plant and franchises conveyed to Andrews and Whitcomb on foreclosure of their mortgage, on September 12, 1891, were on July 25, 1892, conveyed to defendant in error. Plaintiff in error claims that by such organization and transfers, defendant in error took the franchise of the Oconto Water Company *to be a corporation*, as well as the plant and franchise to operate it; and that thereby it *is* the Oconto Water Company and, hence, liable for its debts. The object of such statutes, as is said in 4 *Am. and Eng. Enc. of Law* (1 Ed.) 272 i, is to provide for "the formation of an entirely new corporation for the purpose of purchasing the property of another corporation, and superseding it in business, *without incurring any liability to its creditors.*" The argument of plaintiff in error concludes that a statute, thus in aid of corporate securities, makes them worthless; precludes a mortgagee from enforcing his security, on pain of becoming liable for all junior liens and unsecured debts; makes secured debts insecure and unsecured debts secure. If plaintiff in error has the paramount lien and has or gets title on it, and organizes under section 1788, it will be liable, on this argument, to pay the mortgage debt of $64,000. Which of these parties is bound to pay the debt of the other, depends on which is so unfortunate as to have the paramount lien or title. "It would entirely defeat and destroy the value of mortgage security upon corporate property, if the mortgagees, obliged to become purchasers of the property at a foreclosure sale, could organize themselves into a corporation for the purpose of managing it only upon the condition of assuming the floating debts of the old company. The result would simply be to oblige the secured creditors to pay the debts due to the unsecured creditors. Or, as Mr. Justice Cooper quaintly remarked, it 'would be a practical illustration of the query 'does prohibition prohibit' in the form of 'does security secure' ". 1 *Thompson Corporations* Sec. 263.

It is the settled law that a corporation which *succeeds* to the property and franchises of another corporation by purchase is not liable for its debts.

Neff vs. Boom Co., 50 Wis. 585.
Menasha vs. R'y. Co., 52 Wis. 414.
Pennison vs. R'y. Co., 93 Wis. 344, 346.
Wright vs. R'y. Co., 25 Wis. 46, 53.
Child vs. R'y. Co., 129 Mass. 170.
Hoard vs. R'y. Co., 123 U. S. 222, 226.
Water Co. vs. Mogens, 79 Tenn. 37.
1 *Thompson on Corp.*, Sec. 263.

The cases relied on by plaintiff in error have no bearing. (1) In those opinions from which phrases are wrenched to show that there is a tradition of the franchise *to be* a corporation from one corporation to another, the courts were either not considering that franchise but the franchise *to operate*, or there was a *consolidation* of corporations rather than a *succession* of property by one corporation from another by *purchase*. (2) In every case in which a foreclosure purchaser was held to pay a claim, the claim was a paramount lien, or an interest in land paramount to the mortgage, or under a contract which the mortgagee or purchaser had assumed. Thus, in *R'y. Co. vs. Bonney*, 117 Ind. 501, 20 N. E. Rep. 422, the opinion states that "after Bonney *had acquired his lien*, the franchises and property of the railroad company were sold in pursuance of a decree foreclosing a trust mortgage which has been executed by the railroad company, but *which was a junior lien to that of Bonney*." Of course, the new company took subject to the paramount lien. The court simply held "that as the debt remained unpaid, the *lien* afforded the basis for the exercise by the equity court of its jurisdiction to coerce payment." It is idle to cite such cases. If plaintiff in error, as in that case, has a lien senior to the mortgage, there is no question. But it concedes and it is *res adjudicata* that it has no lien at all as against the mortgage.

II. Defendant in error is not liable because it bought knowing that the pipe went into the plant.

If the proposition that it is thus liable is sound, it must also be true that if Andrews and Whitcomb had

had no mortgage, or if it was void as was contended, and plaintiff in error had had a valid lien, it would have been liable to pay Andrews and Whitcomb's debt of $64,000, which went into the construction of the plant, since it purchased on its lien foreclosure knowing that fact. The argument, like the one from corporate succession, comes to the conclusion that the better one's security is, the less he is secured.

A purchaser's rights on foreclosure are not affected by knowledge of claims for the betterment of the mortgaged property, which are not liens paramount to the mortgage. This is so whether the consideration for the unsecured claims or junior liens went for the construction, existence or repair of the mortgaged property. It is so whether the purchaser is a natural person or a corporation. "As the purchaser at the foreclosure sale, in nearly all cases, organizes a new corporation, under enabling statutes, to hold and operate the railroad property, such new corporation takes it *free from liability for all debts* of the mortgagor corporation which are not secured upon the property *by a lien paramount to the mortgage.*" 5 *Thomp. Corporations*, Sec. 6237.

R'y. Co. vs. Cowdry, 11 Wall. 482.
Cowdry vs. R'y Co., 93 U. S. 352.
Wood vs. Trust Co., 128 U. S. 417, 421.
Kneeland vs. Trust Co., 136 U. S. 89, 97, 98.
Iron Co. vs. Trust Co., 79 Fed. Rep. 202, 210.
Trust Co. vs. R'y. Co., 80 Fed. Rep. 624.
Raht vs. Attril, 106 N. Y. 423.
Ellis vs. R'y. Co., 107 Mass. 1, 17.
Hale vs. R'y. Co., 60 N. H. 333.
Hooper vs. Trust Co., 32 Atl. Rep. 505 (Md.).

Mr. Justice Brewer: "One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his *vested* and *contracted priority*, as the holder of a mortgage on a farm lot." 136 U. S. 97. The New York court of appeals: "The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the

mortgage, but as changed or improved by accretion, or *by labor expended upon it while the mortgage is in existence.* Creditors having debts created for money, labor or *materials* used in improving the mortgaged property, acquire, on that account, no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection." 106 N. Y. 432. Mr. Jones: "A claim for *materials* furnished an insolvent railway company, *which is not a lien by virtue of any statute*, is not entitled to payment out of the fund arising from a sale of the property at the instance of prior mortgage bondholders, until the bonds are paid." *Corp. Bonds and Securities*, Sec. 587.

A mortgage is thus supreme and the mortgagees and those under them are thus free from liability, whether the improvement of the mortgaged premises precedes or follows the execution of the mortgage. The mortgage when executed embraces the property in its *then* improved condition, and also embraces all subsequent improvements, free from *unsecured debts and junior secured debts*, for the improvements. Where there is no lien for improvements, they can never give any right against a mortgage which thus embraces them, either of payment, redemption or other relief. A mortgage would be a barren security were this not so. And there never is any lien for improvements, *save by statute or contract.* There is no such lien in *equity.*

2 *Jones on Liens*, sec. 1184.
Ellison vs. Jackson Water Co., 12 Cal. 542.
Rees vs. Luddington, 13 Wis. 276, 279.
Wilson vs. Rudd, 70 Wis. 98, 103.
Mushlett vs. Silverman, 50 N. Y. 360.
Benton vs. Wickire, 54 N. Y. 226.

By mistake, the mortgage was not recorded for a few weeks. But as to creditors not obtaining a lien before it was recorded, that is immaterial. It is also immaterial as to one who obtains a *mechanic's lien* after the execution, before it is recorded.

Mathwig vs. Mann, 96 Wis. 213.
Rees vs. Luddington, 13 Wis. 276.

It must, therefore, be immaterial as to one who is a mere unsecured creditor. It was found in the lien suit that there was no fraud in not recording the mortgage or otherwise. *Nat. Found, etc. vs. Water Co.*, 68 Fed. Rep. 1006, 1013. And it was determined in the creditor's suit, between these parties, that the mortgage was valid and paramount to the alleged lien of plaintiff in error. 46 U. S. App. 281, 619.

In the cases relied on by plaintiff in error, the claimant had some lien or interest in the property paramount to the mortgage. No case is produced which rules that a foreclosure purchaser must pay unsecured claims or junior liens for betterment, or that betterment, without statute, gives any ground for relief against a mortgage.

IV

The state court had jurisdiction of the suit to foreclose the mortgages.

1. This is not material. If, as was determined in the creditor's suit and as is conceded, the mortgage was paramount, it matters not whether it was foreclosed. Without foreclosure, the mortgagees or those under them cannot be made to pay an unsecured debt or junior lien, or to deliver possession to one who has not a paramount claim. The defendant in error, as purchaser under foreclosure, even if such foreclosure was void, is entitled to the possession, as against those not having paramount claims, *until the mortgage debt is paid.*

Bryan vs. Brassius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Cunningham vs. R'y. Co., 156 U. S. 400, 425.

2. The question is concluded by the decision in the creditor's suit. The complaint, judgment, sale, deed and confirmation were set forth in full in the answer in that suit. (Trans. pp 95 to 97, 121 to 127). Plaintiff in error challenged the foreclosure title for fraud in the mortgages, because they embraced the franchise and not the plant, and because the sale was within the period of re-

demption. It had its day in court in that suit on the question of the validity of that title. It cannot now raise the question, on a ground as fully presented by the record in that case as it is here. The question of the validity of the foreclosure cannot be reopened as often as the wits of counsel can suggest a new reason for their contention.

Cincinnati vs. Emmerson, 57 Oh. St. 132.
Grunert vs. Spaulding, 104 Wis. 193.

"If the defeated party, through the carelessness of himself or attorney, fails to bring to the attention of the court all the reasons or grounds favorable to his contention, he should not be permitted again, on that account, to harass and vex his opponent by bringing forward in a second action the omitted reasons or grounds." 57 Oh. St. 132.

3. Passing the point of res adjudicata, it is clear the state court had jurisdiction of the foreclosure. The only ground on which jurisdiction first exercised in one suit precludes action in another suit between other parties for another cause, is that such action will or may, in some way, conflict with or impair the jurisdiction first assumed. The reason of the rule fixes the limit of its application. Failing possibility of such interference with jurisdiction first taken, each action may proceed regardless of the other. In an action *in rem* all the world are parties; the object of it is to affect, in some way, the status of the *res;* it is begun by taking possession, actual or constructive, of the *res*. Nothing can be done in any other action to interfere with the possession or to affect the status of the *res*, because it would conflict with the jurisdiction of the court over both the *res* and the *parties* in the action in rem. So if possession is taken in an action in personam, to get jurisdiction or to enforce the remedy, it cannot, while it continues, be interfered with by another court in another action, because that would impair jurisdiction first exercised. But where, in actions in personam in different courts between different parties, there is no possession by either court, there is and can be no collision of

authority. Each judgment binds only the parties to it and there is no possession for dispute. This is so although the actions are quasi in rem. In *Freeman vs. Alderson*, 119 U. S. 185, the court, by Mr. Justice Field, said: "Such are actions * * for the enforcement of mortgages and other liens. Indeed all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem in that *the interest of the defendant is alone sought to be affected*, that citation to him is required, and *that judgment therein is only conclusive between the parties.*" That the judgment in such suits only affects the *parties* and *the interest of the defendant in the property* is settled.

Day vs. Micon, 18 Wall. 156, 162.
Dupasseur vs. Rochereaux, 21 Wall. 130, 136.
Hassell vs. Wilcox, 130 U. S. 493.
Dull vs. Blackman, 169 U. S. 243, 248.
McCoy vs. Quick, 30 Wis. 521.
Lampson vs. Brown, 41 Wis. 484.
2 *Black on Judgments*, Secs. 793, 795.
2 *Jones on Liens*, Sec. 1571.

Therefore, in actions quasi in rem in different courts between different parties to enforce different liens, if neither court has possession of the property, nothing that either can do can possibly conflict with the jurisdiction of the other; no more than if the actions were strictly in personam. There is no possession to interfere with. There can be no friction between the judgments; for each only binds the defendant in it and only affects his interest in the property. What that interest is depends on the existence and rank of the lien of the plaintiff in the other action, which the judgment cannot determine or affect. When there has been judgment and sale in each action, the question of what interest of defendant each sale transferred, can only be determined in some suit to which both are parties.

This foreclosure judgment did not bind plaintiff in

error and the lien judgment did not bind defendant in error, as to the existence or priority of the respective liens asserted. Each could dispute the lien of the other because not a party to the suit in which it was foreclosed, in any court, state or federal. Each did so in the creditor's suit. There was no possession, actual or constructive, in either court, during the foreclosure suit. The mortgagor was in actual possession during the whole time. There was no right to take the possession from it, no claim or prayer for possession under the complaint in either action. There was no more reason against the actions proceeding concurrently than successively, as they did in *Hassell vs. Wilcox*, 130 U. S. 493. Had the mortgages been wholly foreclosed before the lien suit was begun or after it ended, the judgment would have been undisputedly valid; yet the question of what interest of the mortgagor it affected, so far as it depended on the existence and priority of the mechanic's lien, would have been precisely the same as it was in the creditor's suit.

The foreclosure decree and sale could not interfere with any right of the court to put the complainant in the lien decree in possession under it by writ of assistance. It could only give possession upon the lien decree, against the defendant therein according to its interest; not as against those not parties to it claiming by paramount right. *Terrel vs. Allison*, 21 Wall. 289. Such possession it could give despite the mortgage foreclosure. If the mortgagor alone was in possession he could be made to deliver it up. But at the date of the lien decree, the mortgagees were in possession claiming right to it, and if their foreclosure were void, they could not be thus evicted.

Bryan vs. Brasius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Terrel vs. Allison, 21 Wall. 289.

The following cases sustain the jurisdiction of the state court to make the foreclosure decree.

Wilmer vs. R'y. Co., 2 Woods 409, 426.
East Tenn. etc. R'y. vs. R'y. Co., 49 Fed. Rep. 608.

Compton vs. Jessup, 68 Fed. Rep. 263, 283.
In re. Hill vs. Stillson, 73 Fed. Rep. 527.
Jenks vs. Brewster, 96 Fed. Rep. 625.
Shields vs. Coleman, 157 U. S. 168.
U. S. Tel. Co. vs. Trust Co., 147 U. S. 431, 448.
R'y. Co. vs. Loan & T. Co., 172 U. S. 493, 515

In the Wilmer case, Mr. Justice Bradley said: "The test, I think, is this; not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. * * * Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property, and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction." 2 Woods, 426. This test has been challenged, but only in so far as it denies jurisdiction of the property without actual seizure, when the object of the suit is to take possession and it is necessary for the relief sought. In such cases, it may be said, that for any other court to take actual possession will cause conflict of orders and judgments in the two courts. On the other hand, it may be said, the seizure by the second court does not conflict with anything the first court has done at the time of seizure; and as the parties are different, what *is* done in the second action should not fail because something *may*, or *is sought* to, be done in the first action which will conflict with it. Be this as it may, no case has ever disputed Justice Bradley's test when possession in the first action was neither had nor sought for and there was no right to take it pending suit. The utmost limit of the doctrine is thus suggested in *Shields vs. Coleman*, 157 U. S. 168:

> "It is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in one court *with the view of the appointment of a receiver*, they may be continued to the completion of *actual possession*, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of proceedure, seize the property, and thus prevent the court in which the proceedings were first commenced from as-

serting its right of possession. * * Of course, the question can fairly arise only in a case in which the process has been served, and in which *the express object of the bill*, or at least *one express object, is the appointment of a receiver*, and *where possession by such officer is necessary for the full accomplishment of the other purposes named therein.*"

Cases are cited for plaintiff in error where the jurisdiction first taken was in proceedings in rem, as *Heidritter vs. Oil Co.*, 112 U. S. 294; where the *parties in both suits were the same;* in bankruptcy proceedings which are in rem and sequester the estate from the filing of the petition; in receiver and attachment suits where property was in actual custody, or in process of being taken into custody; in suits *the parties to which in some other suit* seek conflicting relief as in *F. L. and T. Co., vs. R'y. Co.*, 20 Sup. Ct. Rep. 564. In all these cases, the jurisdiction first taken would be impaired or defeated, if that challenged were sustained. Loose expressions may say, some ill-considered case may hold, that pending a suit to foreclose a lien or mortgage, one not a party can never foreclose his paramount lien or mortgage in any other court. But it is the clear result of the reasoning of all the decisions, those relied on by plaintiff in error as well as those herein cited, that such second foreclosure is only precluded when it conflicts with jurisdiction first taken in the first foreclosure; and that cannot be if no possession is or can be taken in either suit.

V

The judgment gives the right relief.

Its decision that plaintiff in error has not and never had any lien and that defendant in error holds and owns the property by title paramount to, and free and clear of, any such lien, of which its counsel complains, determines the exact issues made by the pleadings. The complaint sets out the sale of the pipe, the lien decree and marshal's deed, and the foreclosure of the mortgages, and then alleges that by the decree and deed plaintiff in error "became and now is the owner and holder of *all* the right,

title and interest which the Oconto Water Company had," on September 15, 1890, or has since acquired, "which title * * * *is prior to any lien upon or title to said plant* now or at any time held or acquired by" defendant in error. The prayer is that, because of such lien and deed, plaintiff have possession of the plant, unless defendant pay the "amount due to it under its mechanic's lien decree." (Trans. pp 15 to 17). The answer admits the foreclosure of the mortgages and avers that thereby Andrews & Whitcomb "became the owners of the property mortgaged;" and denies "that the plaintiff is the owner or holder of any right, title or interest" in the property. (Trans. pp 23, 24). It sets up the decree in the creditor's suit as *res adjudicata* "that as to defendant * * and all the world except the defendant in said [lien] decree, the plaintiff had and there could be no lien on the premises * * *; that defendant and Andrews and Whitcomb purchased, held and owned said premises and property by claim and title paramount and free and clear of any claim or lien of said plaintiff; and that, under the laws and policy of Wisconsin, * * * there was and could be no lien." (Trans. pp 27, 29). The court determined these issues for defendant in error and found that the decision in the creditor's suit determined that as to the defendant in error and Andrews and Whitcomb, plaintiff in error never had any lien, and that the issues in such suit "as to the existence and supremacy of such lien against this defendant were the same as in this case * * * and that the questions there raised became, by the decree of the court, *res adjudicata* between the parties hereto." (Trans. pp 31, 32).

That the creditor's suit did involve the issues whether plaintiff in error had any lien by the lien decree or otherwise, whether defendant in error had paramount title by its foreclosure, and whether that title embraced the plant as well as the franchise, appears by the pleadings in that suit. It is shown by the decisions in that suit. 46 U. S. App. 281, 619. It is shown by the nature of that suit. It was a creditors' suit to sequester the plant and franchises and apply them to liens according

to their priority, and to unsecured creditors. If plaintiff in error had a lien paramount to the mortgages, it would be paid first. If it had no lien, it would share only as an unsecured creditor. If the mortgage was paramount, it would share first, unless it had been validly foreclosed; and, if it had been so foreclosed, and embraced plant as well as franchise, the creditors' suit must be dismissed. The court held that the mortgage was paramount because, as against it, there was no lien; that the mortgage embraced the plant as well as the franchise, and that it had been validly foreclosed. And so the bill was dismissed.

The direct issues in the present case were, therefore, whether the plaintiff in error had any lien, as to defendant in error, and whether defendant in error held by title paramount and free from such lien. When the bill asserts a lien and that it is paramount to any title of defendant, and the answer denies the lien and alleges paramount title in defendant, the court by adjudging that complainant has no lien and that defendant has paramount title, simply *determines the issues*. No cross-bill, or counter-claim, or prayer is necessary for that. "It is not only the right but the duty of the court, when all the parties are before it, to adjudge the rights of all and leave nothing open for future litigation if it can be avoided." 5 *Enc. of Plead. and Prac.* 958. "It is a fundamental principle of courts of equity to make as complete a decision upon *all the points embraced in a cause* as the nature of the case will admit of." *Daniels Ch. Pr.* (1 Ed.) 635; 1 *Black on Judgments*, Sec. 146.

The judgment here simply follows the conclusions of law (Trans. p 32) and the opinion of the trial court. It would have been just as conclusive of the rights it determines if it had simply dismissed the bill; for the pleadings, conclusions of law and opinion could be examined to show the points determined. The determination, however, was properly embodied in the decree, to save resort to such examination.

VI

There is no right of redemption under the general prayer for relief.

No claim of such right was made or decided. And there is no such right. In the creditors' suit the court said: "The question whether appellees [plaintiff in error] as *judgment creditors* of the Oconto Water Company have a right to redeem * * does not, in our opinion, arise upon this record, and will not be prejudiced by our decision." 46 U. S. App. 619. The plaintiff in error had judgments at law for its debt, besides the lien decree, and it claimed that "by reason of these judgment liens, if not by reason of the lien decree," it had right to redeem. But the judgments at law were after the foreclosure sale, and so could give no right to redeem.

Stout vs. Lye, 103 U. S. 66.

The court could not have meant that there was a possible right to redeem because the lien decree gave a mechanic's lien; for it had decided that there was no lien by that decree or otherwise as against the mortgagees and defendant in error.

To redeem from a mortgage after foreclosure, one must have had a definite lien or interest before the foreclosure suit was begun.

Stout vs. Lye, 103 U. S. 66.
Herring vs. R'y. Co., 105 N. Y. 340.
Hallim vs. Coal Co., 150 U. S. 371, 386.
2 *Jones Mortgages, Secs.* 1048, 1049, 1055.

Plaintiff in error had no mechanic's lien in fact. This is the settled law of the state and is *res adjudicata* by the determination in the creditors' suit. The lien decree, against the Oconto Water Company only, was after the foreclosure sale. So were the judgments at law. There is no pretense of any other lien or interest in plaintiff in error. The mortgagees rightly omitted to make

plaintiff in error a party to their foreclosure, because, as the courts, state and federal, agree, it had in fact no lien and, hence, no redeemable interest. It would not have been a proper party. (See cases last cited). The right action of the mortgagees in foreclosing cannot be nulified by a subsequent wrong decision in the lien suit to which they were strangers.

The right of redemption is favored. An interest, although voidable, gives the right. The mortgagee cannot defeat the right by showing that the interest is wrongful or otherwise avoiding it, if it actually *exists* before his foreclosure. But, if there is no redeemable interest in fact at the time of foreclosure, right of redemption cannot be afterwards created by a wrong decision between strangers to the foreclosure, that such interest did exist at that time. Right of redemption cannot be favored by resort to a fiction that it existed before foreclosure, when it really did not, to defeat rights under the judicial sale.

In seeking redemption, because of the erroneous lien decree, plaintiff in error is simply returning into a court of equity, to get some benefit from such decree against one not a party to it, within the rule of *Lawrence Mfg. Co. vs. Cotton*, 138 U. S. 552. Its success would, practically, enforce its alleged mechanic's lien, against the public policy of the state as much as to sell the plant and franchise under the mechanic's lien decree; for it would take them from the domestic corporation which is the agent of the state for their operation for the public use, and give them to this foreign company.

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No. 216.
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OCTOBER TERM, A. D. 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

GEORGE G. GREENE,
JEROME R. NORTH,
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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Our original brief was necessarily prepared before that of plaintiff in error was filed. In it we assumed that plaintiff in error would make the same contention that it did in the state court. In this we were mistaken. The main propositions on which it asked reversal of the judgment of the trial court are not now asserted; doubtless because they plainly do not involve federal questions. The contentions now made by plaintiff in error are reducible to three: I. That it has title under the lien decree paramount to the mortgage title of defendant in error. II. That the state court had no jurisdiction of the mortgage foreclosure. III. That the judgment of the state court is too broad.

I.

The claim that plaintiff in error has paramount title under the lien decree is contrary to its concession in the state supreme court, as appears from the opinion of that court. (Trans., pp. 182-183.) The very nature of the action concedes the supremacy of the mortgage title. For, if plaintiff in error has the paramount title, it can not compel defendant in error to pay its debt or claim, which it seeks to do. On that theory, it would own the plant and franchise by its marshal's deed, and could recover it in ejectment.

But the judgment in the creditors' suit which was between these parties, is conclusive that the decree in the lien suit, which was not between them and does not bind them, gave no lien. It is not true that the issues in the creditors' suit and the decision of them, did not involve the supremacy of the lien and mortgage claims and titles. That was the principal controversy. Plaintiff in error asserted its lien by the lien decree and without it, and denied the validity of the mortgages and their foreclosure. Andrews and Whitcomb, in whose shoes the defendant in error stands, denied the lien, claimed they were not bound by the lien decree because not parties to it, and asserted their foreclosure title. The opinions show this.

Andrews et al. v. *National Foundry, etc.*, 46 U. S. App., 281, 619.

The decision was in favor of defendant in error on each question. 1. That the lien decree did not affect defendant in error. 2. That plaintiff in error has no lien. 3. That defendant in error has title by the mortgage foreclosure. It is suggested that the final decree on the mandate was not as broad as the opinions. But this is a mistake. It dismissed the bill as to Andrews and Whitcomb and defendant in error pursuant to the opinions. This it could not have done if plaintiff in error had a paramount lien; for then it would have been entitled to preference on distribution in the creditors' suit. Nor could the bill have been thus dismissed unless defendant in error had title by its foreclosure. For

then distribution would still be necessary, the defendant in error sharing as a mortgage creditor. But the final decree did more. It in terms decreed *the title to be in defendant in error pursuant to the mortgage foreclosure.* It decrees:

> "Fifth. That the legal title to the land upon which the pumping station and wells of the water works plant are located, which heretofore by deed dated the 31st day of January, A. D., 1894, was conveyed, by the order of this court, by the City of Oconto to the said defendant, Oconto Water Company" (here follows description of the plant), "be and the same is hereby passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and *of the sale in the proceedings to foreclose the same,* to the said defendant, Oconto City Water Supply Company as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Company, and its receiver, Albert E. Smith, by separate instruments, duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant, Oconto City Water Supply Company," etc. (Trans., pp. 144, 145.)

There is, then, against the contention that plaintiff in error has any lien or lien title, this final judgment denying such lien or title and transferring paramount title to defendant in error, as well as the repeated decisions of the state supreme court that the state statute gives no such lien, and that it is against the policy of the state that one should exist.

Claim is made that when plaintiff in error furnished materials, the state supreme court had held that the statute did give such a lien, and that these decisions were overruled by those followed in the creditor's suit. Therefore, it is argued, plaintiff in error had a vested contract right to a lien when materials were furnished, which the later decisions could not affect. But that is concluded by the judgment in the creditors' suit. The question was there directly in-

volved and fully argued. If plaintiff in error had such right under prior decisions, the judgment must have sustained and enforced it; but the court held that the "exact question" arose in the *Chapman Valve Company* case for the first time, and followed it. (46 U. S. App., 281.)

And this is clearly so. In *Hill* v. *Ry. Co.,* 11 Wis., 214. a lien was sustained against a railroad building, and in *Purtell* v. *C. F. & B. Co.,* 74 Wis., 132, against a bridge. But the first case went on the ground that the building was separable from the franchise to operate the road, and the judgment did separate them and was confined to the building only. In the second case, the statute in terms gave a lien on "any bridge" and this was held to embrace the bridge in question. Here it is plain that the franchise and plant are inseparable, and the lien decree accordingly provided for the sale of the franchise, thus in effect extending the lien to it. And the terms of the statute here can not fairly be construed to embrace a water-works plant. It confines the lien to a quarter of an acre of land, except for *labor* on a structure covering more. In this plant there are some twelve miles of pipe. In *Wilkinson* v. *Hoffman,* 61 Wis., 637, decided in 1884, the court held that in view of the language of the statute and on grounds of public policy, there could be no mechanic's lien on a water-works plant owned and operated by a city. In the *Chapman Valve Company* case, this decision was followed and applied to such a plant owned by a corporation organized and authorized to supply water to a city and its people (89 Wis., 264), on the ground that the effect on the public interests of enforcing such a lien would be the same in each case. All this was fully presented in the creditors' suit, and its decision that there was no lien is as conclusive of this question as of any other.

It is said that the answer herein does not attack the lien decree or the title claimed under it. By its 13th division the answer denies any title or interest in plaintiff in error (Trans., p. 24), and by the amendment to the answer it pleads the decree in the creditors' suit in bar. (Trans., pp. 24, 29.) It appears from the bill that defendant in error was not a party to the lien decree, and this fact is stated in

the 4th and 17th divisions of the answer. (Trans., pp. 22, 29.)

It is said that Andrews and Whitcomb were bound by the lien decree because stockholders. The contrary is directly decided in the creditors' suit (46 U. S. App., 619).

II.

The claim that the state court had no jurisdiction in the mortgage foreclosure, is sufficiently discussed in our original brief (pp. 16-21).

As we have seen, the final decree in the creditors' suit vests the title in defendant in error "by virtue of the instruments "of mortgage, dated September 13, 1890, and March 13, "1891, * * * and *the sale in the proceedings to fore-* "*close the same.*" (Trans., p. 145.) This is a final adjudication between the parties that the foreclosure was valid.

And this meets the contention of plaintiff in error that as to the second mortgage the lien decree was paramount by *lis pendens*. The decree is that defendant in error has the title by the foreclosure of *both* mortgages.

Farmers' Loan & Trust Co. v. *R. R. Co.*, 177 U. S., 51, was within the rule of *Shields* v. *Coleman*, 157 U. S., 168. It was "a case in which * * * *the express object of* "*the bill, or at least one express object, is the appointment* "*of a receiver, and where possession by such officer is neces-* "*sary for the full accomplishment of the other purposes* "*therein named.*" Besides, in that case there were the same parties in each suit.

III.

The claim that the judgment is too broad is not a federal question. But the judgment is right. In the creditors' suit the court had to determine: (1) Whether the lien decree bound Andrews and Whitcomb and the defendant in error; and (2) whether, if it did not, there was a paramount lien in truth. When it had determined the first question in the negative, it was still confronted by the second; for, if the

plaintiff in error had a paramount lien in truth, it would, to its extent, defeat the mortgage title. The second question was solved by holding that plaintiff in error had in truth no lien at all. This is *res adjudicata;* and it is just what the judgment herein determines. As to the parties to this suit, it is settled by that decree that plaintiff in error has no lien and never had any. And as this is the settled law and policy of the state, the decree is right in so affirming. But the question is sufficiently discussed in our original brief (pp. 21-25).

IV.

Counsel for plaintiff in error suggested on the argument that the question whether the Wisconsin statute gives a lien on such a plant is again raised in *Pittsburg Testing Laboratory, Limited,* v. *Milwaukee Electric Railway & Light Company,* now pending in the state supreme court. In that case counsel for plaintiff in error appears for the defendant in *resistance* of the lien. Manifestly, the determination of that case cannot affect the decision of this case. It being *res adjudicata* by the decree in the creditors' suit that there is no lien, the bar of the decree cannot be affected by a decision in another case between other parties that a lien should have been decreed.

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No. 93.

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STATE OF WISCONSIN,

Certified Copy of Opinion of Court.

IN SUPREME COURT.

Filed July 16, 1901.

PITTSBURG TESTING LABORATORY, LIMITED,

Appellant,

vs.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, IMPLEADED WITH OTHERS,

Respondent.

93

Certified Copy of Opinion of Court.

STATE OF WISCONSIN.

IN SUPREME COURT.

PITTSBURG TESTING LABORATORY, LIMITED,

Appellant,

vs.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, impleaded with others,

Respondent.

Cassoday, C. J. This is an appeal from an order sustaining a demurrer to the complaint to enforce a sub-contractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pa., and that the defendant, the Milwaukee Electric Railway and Light Company, was a corporation located at Milwaukee, and organized to engage and engaged in the business of operating in the city of Milwaukee a system of street railway and an electric light and power plant, and that the defendants Warren and John Roberts were co-partners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the city of Milwaukee for lighting certain streets therein, which contract was entered into July 15,1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances, *"other than the new power house hereinafter mentioned;"* that the electric company had long

prior to entering upon the construction of such new power house, constructed power houses in various parts of the city and placed therein proper engines, boilers and machinery, and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric light and power plants of the electric company as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its contract with the city until the expiration thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lightning and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the electric company in 1898 caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contract with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the electric company and situated on the land hereinafter specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as sub-contractor by Warren Roberts & Co. under their contract with the electric company, to test and inspect such structural material; that as such sub-contractor, under such employment, the plaintiff per-

formed work and labor for Warren Roberts & Co. between February 6, 1899, and August 19, 1899, that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached, contain a true and correct statement of the work, tests and inspections thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co. for the doing of such work; that all of such work and labor was done performed upon structural material which was sold and furnished to be used and which was actually used by Warren Roberts & Co., in the construction and erection of such new power house; that such new power house stands and is situated upon two lots therein described; that the electric company at the time of making such contract with Warren Roberts & Co., was and ever since has been and now is the owner of the land and of the new power house building situated thereon; that the same does not exceed one acre in extent and is within the limits of the city; that the last date of the performance of such labor of this plaintiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are hereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests and inspections, of which true copies are hereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co., in the office of the clerk of the circuit court of Milwaukee county, a copy of which claim for lien is hereto attached; that such claims and all the allegations thereof are true and are hereby made a part of this complaint; that one year has not elapsed between the doing of such

work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim $777.29, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

The question presented is whether the facts stated are sufficient to entitle the plaintiff to a sub-contractor's lien upon the premises described under the statutes of this state for the work and labor performed. Secs. 1775, 1775a, 3314, 3315 R. S. The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof, therein, upon complying with the provisions of such statutes. Id. It is virtually conceded that the facts alleged would entitle the plaintiff to such lien, if the premises were owned by a private party and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a *quasi* public corporation engaged in operating a system of street railways and an electric light and power plant in the city of Milwaukee. In support of such claim counsel rely upon certain decisions of this court; and counsel for the plaintiff rely upon certain other decisions of this court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all of such decisions—much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated. The early case of Hill vs. the La Crosse and Milwaukee R. R. Co., 11 Wis. 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block which, had it been completed according to the contract, would have extended 'along the whole front of the block, upon the street—being 420 feet and to the depth of 55 feet—and constituted the

defendant's depot in Milwaukee." The "judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41." On the application of the company for a modification of the judgment it was made to appear, "that the railroad track was laid across the east part of the block between the buildings and the river—that the whole block was not necessary or convenient for the use of the buildings erected which were designed for stores and offices;" and thereupon the court modified the judgment "so to confine the lien to the west 60 feet of the particular lots on which the building as far as erected actually stood." On the appeal by the plaintiff from such modified judgment, the same was reversed by this court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that as the block exceeded an acre it was necessary for the court to determine to what portion of the block the lien extended; and so this court came to the conclusion, "that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street." The court reached that conclusion expressly because the premises were "at the very end of the road, and where, from the very nature of the premises, it would be more convenient to both parties," that they should be so divided, in order that each party should "have access both to the river and the street." As the land was situated at the very end of the railway tracks, the lien could be thus enforced without destroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion

may not in all respects be approved. The learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplicable. The decision seems to have gone largely upon the ground of the superior equity. Two years after that decision a mechanic's lien, in favor of a sub-contractor, was enforced by this court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of, the question whether the corporate franchises of the company were thereby destroyed or impaired. Carney vs. The La Crosse and Milwaukee R. R. Co., 15 Wis. 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit. Burnham vs. The City of Fond du Lac, 15 Wis. 193. That case was followed in Buffham vs. The City of Racine, 26 Wis. 449; and Merrill vs. Campbell, 49 Wis. 535. Upon the principle involved in those cases, it was subsequently held by this court that the lien of a sub-contractor, under the statute, did not extend to machinery furnished by him and placed in a building constituting a part of the water-works of a city. Wilkinson vs. Hoffman, 61 Wis. 637. This was not put upon the ground that the general language of the statute (sec. 3314) was not broad enough to authorize such lien, but on the grounds of public policy and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city water-works; that it stood upon the same ground as where material is furnished for a county court house, jail, public school building or other public buildings which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this court. The City of Platteville vs. Beil, 66 Wis. 326, 334; Chapman Valve Manufacturing Co. vs. Oconto Water

Co., 89 Wis. 264-271; Strike vs. Wisconsin O. F. M. L. Ins. Co., 95 Wis. 586. A prominent author states that: "On the grounds of public policy the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties and towns, for public use." 1 Jones on Liens, 2 ed, sec. 1375, citing many adjudications from numerous states. In support of the proposition see Leonard vs. City of Brooklyn, 71 N. Y. 498; Board of Commissioners vs. O'Connor, 86 Ind. 531. The same rule is there stated as applying to school houses and water-works so erected for public use. The "public policy" mentioned, seems to be nothing more than an enforcement of the old common law rule, as stated by Savage, C. J., that: "When a statute is general, and any prerogative right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him." The People vs. Herkimer, 4 Cowen, 348. In an earlier case in the same state it was said that: "In a representative government where the people do not and cannot legally act in a body where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent * * On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty it was equally important to be preserved." The People vs. Gilbert, 18 Johnson, 229. The rule thus stated by Chief Justice Savage was, at an early day, expressly sanctioned by the Supreme Court of the United States, and then added that: "The doctrine that the government should not, unless named, be bound by an act of limitation, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right; and in all such cases, is not to be construed to be embraced unless named, or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act * * * The real ground is a great

principle of public policy which belongs alike to all governments that the pubilc interest should not be prejudiced by the negligence of public officers, to whose care they are confided." U. S. vs. Knight, 14 Peters, 315. See also Savings Bank vs. U. S. 19 Wall; 239 U. S. vs. Herron, 20 Wall.263. As stated in one of these cases, the same principle has been decided in several of the states; and all upon the same ground. In some of the cases it is held, that the statutes of limitation do not run against the state unless expressly declared. The People vs. Gilbert, *supra*; Commonwealth vs.Hutchinson,10 Pa. St. 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state. The question recurs whether the rule applicable to municipalities applies also to *quasi* public corporations. Upon that question there seems to be a diversity of opinion. 1 Jones on Liens, secs. 1378,, 1618 et seq. There can be no question in this state but what electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain. Sec. 13, Art. I Con. Secs. 1845-1863a Stat. 1898. Such being the relationship between the corporation and the public, the Supreme Court of the United States has held that "Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges or other property of a railroad company that *may be essential in the operation and maintenance of its road for the public purposes* for which it was established." Buncombe County Commissioners vs.

Tommey, 115 U. S. 122. In that case Mr. Justice Harlan, speaking for the whole court, said, in effect, that "a different construction of the statute would enable parties having liens" for small amounts, "to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly require it to be done." Id. page 129. Thus it has been held in Pennsylvania that "the results to be produced to the public by public corporations" for building bridges, turnpikes, railroads and the like "cannot be disturbed by the seizure by creditors of any part of the property *essential to their active operations.*" Foster vs. Fowler, 60 Pa. St. 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking and accommodate the public. Id. Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants. Id. The principle involved in that case was approved in a later case, in the same court, "where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation." Girard Storage Co. vs. Southwork Co. 105 Pa. St. 248; and also see Guest vs. Water Co. 142 Pa. St. 610, 615; Reynolds vs. Reynolds Lumber Co. 169 Pa. St. 626. On the other hand it has been held in the same state that: "Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation." Plymouth R. R. Co. vs. Calwell, 39 Pa. St. 337. And yet in the same case, Woodward, J., speaking for the court said: "Though the cor-

poration in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation." Page 339. See also Oakland Railway Co. vs. Kernan, 56 Pa. St. 203. The rule of construction, mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court. The Yellow River Improvement Co. vs. Wood County, 81 Wis. 560-2; s. c. 17 L. R. A. 92, and note; The Fond du Lac Water Co. vs. The City of Fond du Lac, 82 Wis. 322, 329; Chapman Valve Manufacturing Co. vs. Oconto Water Co. 89 Wis. 264; C., M. & St. P. R. Co. vs. City of Milwaukee, 89 Wis. 506; The State ex. rel. Milwaukee Street R. Co. vs. Anderson, 90 Wis. 550; Wright vs. The Milwaukee Electric Ry. and Light Co. 95 Wis. 29; C. & N. W. Ry. Co. vs. Forest Co. 95 Wis. 80, 89; The State ex. rel. Badger Ill. Co. vs. Anderson, 97 Wis. 114. In a recent case Mr. Justice Marshall said: "Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense, and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation." The State, ex rel Atty. Genl. vs. Portage City Water Co., 107 Wis. 446; s. c. 83 N. W. 699. The rule to be deduced from the best considered cases, seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes. But that under the general language of such statutes a lien may be enforced against such structures and property of the cor-

poration as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see National Foundry and Pipe Works vs. Oconto Water Co., 52 Fed. 43, s. c. 68 Fed. 1006; 2 Jones on Liens, 2 ed. Secs. 1618, 1619; 3 Elliott on R. R., secs. 1066-1075. In one of these sections Mr. Elliott says: "The courts will not presume that the legislature intended to subject the public to the annoyance and inconveniences which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required." Id. sec. 1066. The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, have not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a *pro tanto* destruction of the corporate functions created as an entirety and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal *pro tanto* the charter of a corporation so created primarily for the public benefit, especially in violation of a well established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in Carney vs. The La Crosse and Milwaukee R. R. Co. 15 Wis. 503, and the more recent case of Purtell vs. Chicago Forge and Bolt Co., 74 Wis. 132. In the case at bar it is admitted that

the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances, "*other than the new power house*" in question. In other words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows from what has been said, that the plaintiff is entitled to such lien.

By the Court: The order of the circuit court is reversed and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

STATE OF WISCONSIN, }
IN SUPREME COURT. }

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original Opinion of the Court by Chief Justice Cassoday, on file in my office in the above entitled case, and that it is a correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 28th day of June, A. D., 1901.

{Seal of Supreme Court of Wisconsin.}

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.